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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-17) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1948 (R. 18). Petitioner's motion for a new trial was overruled on May 3, 1948 (R. 19). The petition for certiorari was filed on July 7, 1948. The jurisdiction of this Court is

invoked under Section 3(b) of the Act of February 13, 1925, as amended.[1]

QUESTION PRESENTED

Whether, in computing back pay due a civil servant of the United States for the period of his wrongful removal from service, there should be deducted from the full pay to which he otherwise would be entitled, the amount he earned in private employment during that period.

STATUTE INVOLVED

The pertinent provisions of the Act of June 10, 1948 (Public Law 623, 80th Cong., 2d sess.) are set out in the Appendix, *infra,* pp. 12-14.

STATEMENT

This case arises out of petitioner's claim for the full Federal pay he would have earned had he not been dismissed from his civil service job. The following statement summarizes the facts as found by the Court of Claims (R. 6-13):

After passing a competitive civil service examination, petitioner, on February 21, 1941, was appointed probationally by the Attorney General as a naturalization examiner in the Immigration and Naturalization Service of the Department of Justice (R. 6-7). Petitioner entered on duty in

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[1] Effective September 1, 1948, the pertinent provisions of this Act are repealed and reincorporated into the new Title 28, United States Code at Section 1255. See Sections 1, 38 and 39, Act of June 25, 1948 (Public Law 773, 80th Cong., 2d sess.).

the New York City office of the Service on March 18, 1941 (R. 7). After four months, he was given an efficiency rating of "satisfactory" by the Chief Examiner of that office (R. 7). On November 14, 1941, after a total of eight months service, the same officer rated him "unsatisfactory" (R. 7). On January 3, 1942, petitioner was notified by the Attorney General that his probational appointment as naturalization examiner was being terminated and that he was relieved from duty at the close of business that day (R. 7). The notice of dismissal stated that his services had been "unsatisfactory generally"; that the quality of his work was "below the general standard"; and that he had displayed no "aptitude in performing the work of a naturalization examiner" (R. 7). Salary was paid to petitioner by the Service until January 19, 1942, when his accrued annual leave expired (R. 7, 13). On May 12, 1942, Milton A. Woocher, a naturalization examiner in the Detroit office of the Immigration and Naturalization Service was transferred to the New York City office to fill the vacancy created by the termination of petitioner's employment (R. 12). Petitioner promptly protested his dismissal and demanded a "hearing" pursuant to Section 6 of the Act of August 24, 1912 [2] and the rules of the Civil Service Commission governing the removal of employees in the classified civil serv-

[2] For text of Section 6, as amended by the Act of June 10, 1948, see Appendix, *infra*, pp. 12-14.

ice (R. 8). The Attorney General refused, ruling on July 14, 1942, that the procedure fixed by those provisions was not applicable to an employee, who, at the time of dismissal, was still serving out his probational period (R. 8).

Petitioner instituted suit against the Attorney General on July 30, 1942, in the District Court of the United States for the District of Columbia, seeking, *inter alia,* a declaration that he was entitled to notice and hearing before dismissal and a judgment for back salary from the date of his discharge (R. 8, 9). The district court granted the Attorney General's motion for a summary judgment (R. 9). On appeal, the United States Court of Appeals for the District of Columbia, reversed, holding that petitioner, at the time of his dismissal, was not a probationary employee but that he had become an absolute employee after six months of service. *Borak* v. *Biddle,* 141 F. 2d 278, certiorari denied, 323 U. S. 738. Accordingly, that court directed the issuance of a declaratory judgment, establishing petitioner's right, prior to dismissal, to the type of notice and hearing provided for by Section 6 of the Act of August 24, 1912. The court further held that the district court was without jurisdiction to award judgment for the back pay. (R. 9.)

On June 5, 1944, the district court entered a declaratory judgment in accordance with the Court of Appeals' opinion (R. 10), and on June 6, 1944, petitioner was advised by the Department of Justice of his reinstatement to office. He was

reinstated [3] on the next day and took leave without pay until August 31, 1944, when he voluntarily resigned (R. 11, 12). In May, 1944, petitioner filed a claim with the General Accounting Office for the amount of his salary during the period between his dismissal and reinstatement (R. 12). The General Accounting Office did not render any decision on the claim, and, on December 28, 1945, petitioner filed the instant suit in the Court of Claims (R. 1, 12).

The Court of Claims, relying on *Elchibegoff* v. *United States,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed on motion of United States, 329 U. S. 694, granted judgment to petitioner for the salary he would have drawn from the United States during the period of his illegal dismissal, but deducted the amount of his outside earnings during that period [4] as a "just credit and offset" under "the provisions of the jurisdictional act (Sec. 250(2) and Sec. 265, [28 U.S.C.]", and entered judgment for the difference (R. 17).

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[3] When petitioner was reinstated no change was made in the status of his replacement, Milton A. Woocher.

[4] Subsequent to his dismissal in January, 1942, petitioner obtained employment as an attorney in the private practice of law and has been continuously so employed since that time (R. 13). During the period between January 19, 1942, and June 7, 1944, that is the period of his removal from office, petitioner's earnings from private practice amounted to $5,267.62 (R. 13). He would have earned $7,038.43 as salary from the United States during that period had he not been removed (R. 12-13). Petitioner at no time contended that in his capacity as a naturalization examiner he would have been able to devote any time to the private practice of law (R. 17).

ARGUMENT

The question of whether earnings should be deducted from salary otherwise due was correctly disposed of by the Court of Claims. Moreover, the Act of June 10, 1948, (Public Law 623, 80th Cong., 2d sess.) Appendix, infra, pp. 12-14, by specifically providing for such deductions, has stripped that question of any general importance. We accordingly submit that its review by this Court is unwarranted.

1. Petitioner, in attacking the allowance of the offset against the damages claimed by him for wrongful exclusion from his civil service position, stresses the fact that the Court of Claims characterized him as an "officer" (Pet. 4, 7, 10). However, while there may be doubt as to whether he was an officer or employee, it is indisputable that the position he occupied was in the civil service. And it has uniformly been held that outside earnings of any civil servant during the period of his wrongful suspension or removal from his civil service job constitute a proper offset. 150 A.L.R. 113-120. See also *Wittner* v. *United States,* 76 F. Supp. 110, 113 (C. Cls.); *Weinstein* v. *United States,* 109 C. Cls. 579, 581-582; *Kelly* v. *State Personnel Board,* 31 Cal. App. 2d 443; *Corfman* v. *McDevitt,* 111 Colo. 437; *State ex rel. Dresskell* v. *Miami,* 153 Fla. 90; *Barton* v. *Brannan,* 141 App. Div. 295; *Seltzer* v. *Reading,* 151 Pa. Sup. Ct. 226.

Nor does the importance or responsibilities of the civil service position change the result. *Stockton* v. *Department of Employment,* 25 Cal. 2d 264, 273-274 (Chief of State Employment Agencies Division); *State Board of Equalization* v. *Superior Court,* 20 Cal. 2d 467, 474 (Supervising Liquor Control Officer, Chief Liquor Control Officer); *LaChicotte* v. *New York,* 166 App. Div. 279 (Principal Assistant Engineer).

The deduction of such outside earnings is not dependent, as petitioner contends, on the existence of a contract and a finding of its breach, but is a sound application of the fundamental principle that a plaintiff should not recover for those consequences of defendant's act which were reasonably avoidable, and which in the instant case were in part avoided, by the plaintiff.[5] *State ex rel. Dresskell* v. *Miami,* 153 Fla. 90, 94; see *Restatement, Agency,* sec. 455, Comment (d); *Restatement, Torts,* sec. 918, Comment (f); Sedgwick, *Damages* (9th ed.), sec. 204.

The Court of Claims, we submit, properly indem-

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[5] Refusal of the courts to deem certain public employment to be contractual in nature is not to be explained, as petitioner implies, as a rejection of the doctrine of avoidable consequences (Pet. 11). Actually, those cases which hold that public employment is not contractual involved the validity, under the Contract Clause of the Constitution (Article I, Sec. 10), of legislative modification of the incidents of the contracts of employment. *Butler* v. *Pennsylvania,* 10 How. 402; *Dodge* v. *Board of Education,* 302 U. S. 74; *United States* v. *Fisher,* 109 U. S. 143.

nified petitioner for the pecuniary loss he suffered. Any larger damage award which failed to deduct outside earnings would have assessed the United States with punitive damages because of an improper discharge resulting from a mistaken interpretation of rules governing petitioner's classification as a probationary or "absolute" employee, and would, at the same time, have gratuitously conferred upon the petitioner far greater compensation that he would have enjoyed had he not been separated from his civil service job.

Those cases, relied upon by petitioner, in which the courts have not applied this well-established rule and have allowed full salary irrespective of outside earnings involved factual situations wholly different from that here involved. Thus, *United States for the use of Crawford* v. *Addison,* 6 Wall. 291, was not a suit against the United States by an improperly-removed civil servant for back salary, but was a suit by a duly-elected mayor against the wrongful usurper of that office for the moneys earned by the latter during the period of time he prevented the plaintiff from taking office.[6] It is

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[6] The facts in that case underscore its complete inapplicability to the issue now here. Crawford had been duly elected Mayor of Georgetown but Addison was wrongfully installed in office. The United States, on the relation of Crawford, then instituted *quo warranto* proceedings against Addison to try title to office and to displace the wrongful incumbent. Crawford was successful in this suit and the court issued a judgment of ouster against Addison. *United States ex rel. Crawford* v. *Addison,* 22 How. 174. However, despite the judg-

clear that the usurper, in such a case, should be held answerable for the salary he improperly appropriated to his own use.

Similarly, *Fitzsimmons* v. *City of Brooklyn,* 102 N. Y. 536, involved a situation in which the position from which the incumbent had been illegally removed had not been filled, and the city, not having paid the salary to anyone else, was directed to turn over the unpaid salary to the wrongfully-suspended employee. Later decisions of the New York Court of Appeals make it clear that a different result would have been reached had the city paid the salary to a replacement. *Matter of Barmonde* v. *Kaplan,* 266 N. Y. 214, 216; cf. *Matter of Mullane* v. *McKenzie,* 269 N. Y. 369, 374, reargument denied, 270 N. Y. 563. Since, as indicated above, another naturalization examiner was transferred to New York City to fill the vacancy created by

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ment of ouster, Addison persisting in his attempts to stay in office, sued out a writ of error to the judgment and furnished a bond to perfect the writ. The writ and bond operated to supersede the judgment of ouster and thus allowed Addison to continue his wrongful tenure in office until such time as the writ of error was dismissed, because of his failure to prosecute it successfully. After the writ's dismissal, which allowed the judgment of ouster to take actual effect, Crawford sued Addison on the bond seeking judgment for the salary received by the intruder during the pendency of the writ of error and the consequent operation of the *supersedeas*. In other words, Crawford sued Addison only for the salary taken by the latter for the period from the date of the bond, which bore the date upon which Addison sued out the writ of error, to the date that Crawford actually got the benefit of the judgment of ouster and took office. It was in these circumstances that this Court allowed the plaintiff all of the moneys wrongfully appropriated by the illegal incumbent.

petitioner's removal from office, the *Fitzsimmons* case is obviously inapplicable.[7]

2. In any event, the issue raised by the petition has no prospective importance whatsoever. The question as to the right of a wrongfully-discharged civil servant to full back pay irrespective of his outside earnings, has been conclusively settled by the recent Act of June 10, 1948, Appendix, *infra*, pp. 12-14. That statute, in amending Section 6 of the Act of August 24, 1912 (37 Stat. 555, 5 U.S.C. 652) so as to confer upon improperly-suspended or removed civil servants the right to back pay for the period of their wrongful dismissal, specifically requires, as did the Court of Claims in the present case, that outside earnings during that period be deducted. The Act requires such a deduction not only with respect to removals deemed necessary to promote the efficiency of the civil service under Section 6(a) of the 1912 Act and under Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. 863), but also with respect to wrongful removals in the course of reductions in force. In view of the comprehensive nature of this statute, which expressly sets forth the requirement

[7] Equally inapplicable are the remaining cases discussed by petitioner (Pet. 12, 13). Most of these cases, such as *United States* v. *Andrews*, 240 U. S. 90, and *Glavey* v. *United States*, 182 U. S. 595, are concerned with the right of an army officer to the half pay specifically conferred upon him by statute for the period of his absence with leave. No question of wrongful separation from service, right to back pay during such separation, or deduction of outside earnings from such back pay, is presented in those cases.

of deductibility of outside earnings in these back pay cases, the decision below does not present a question of general importance sufficient to warrant review by this Court.

CONCLUSION

The decision of the Court of Claims is correct. Moreover, the recent enactment of June 10, 1948, eliminates the possibility of the recurrence of the question here presented. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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AUGUST 1948

APPENDIX

The pertinent provisions of the Act of June 10, 1948 (Public Law 623, 80th Cong., 2d sess.), amending Section 6 of the Act of August 24, 1912 (37 Stat. 555, 5 U.S.C. 652), provide:

"Sec. 6. (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 14 of the Veterans' Preference Act of 1944, as amended, only if he so elects.

"(b) (1) Any person removed or suspended without pay under subsection (a) who, after filing a written answer to the charges as provided under such subsection or after any further appeal to proper authority after receipt of an adverse decision on the answer, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

"(2) Any person who is discharged, suspended, or furloughed without pay, under section 14 of the Veterans' Preference Act of 1944, as amended, who, after answering the reasons advanced for such discharge, suspension, or furlough or after an appeal to the Civil Service Commission, as provided under such section, is reinstated or restored to duty on the ground that such discharge, suspension, or furlough was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such discharge, suspension, or furlough for the period for which he received no compensation with respect to the position

from which he was discharged, suspended, or furloughed, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period.

"(3) Any person removed or suspended without pay in a reduction in force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date."

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